COURT OF APPEALS
DECISION
DATED AND FILED

April 6, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP953-CR **Cir. Ct. No. 2013CF201**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HENRY J. BLOEDORN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 REILLY, P.J. Henry J. Bloedorn appeals his judgment of conviction and the circuit court's denial of his postconviction motion to withdraw

his ***Alford***[1] plea, alleging that defense counsel was ineffective for (1) failing to adequately advise him regarding the evidence against him, defense strategy, and possible prison sentences; (2) allowing a presentence investigation (PSI) to continue while he was still considering whether to withdraw his guilty plea; and (3) failing to properly argue for a reasonable prison sentence. We affirm.

BACKGROUND

¶2 On September 3, 2013, Bloedorn was charged with one count of repeated sexual assault of a child, one count of incest, and one count of child enticement for the sexual assault of his grandson, N.T.K., who was between eleven and fourteen years old when the sexual assaults occurred.[2] Bloedorn confessed to sexually assaulting N.T.K. to law enforcement after proper ***Miranda***[3] warnings. Bloedorn later retained defense counsel to represent him in this matter.

¶3 On October 14, 2013, defense counsel and Bloedorn held "a very, very extensive long meeting" to develop their "initial defense strategy," decide whether to have a psychosexual evaluation done, and consider whether Bloedorn would waive a preliminary hearing.[4] At that meeting, defense counsel reviewed the initial evidence and likely evidence against Bloedorn. Defense counsel informed Bloedorn that the State was recommending prison, but he had already

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

[2] Count one was in violation of WIS. STAT. §§ 948.02(1) or (2) and 948.025(1)(e) (2013-14). Count two was in violation of WIS. STAT. § 948.06(1). Count three was in violation of WIS. STAT. § 948.07(1). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[4] On October 16, 2013, Bloedorn waived his right to a preliminary examination.

secured a promise from the State that Bloedorn would not be charged with a related sexual assault in Washington County if he pled guilty in Ozaukee County.[5] Defense counsel next met with Bloedorn on October 30, 2013, where they discussed the evidence and whether defense counsel would file a Fifth or Sixth Amendment challenge to the confession Bloedorn made to police in Washington County. Defense counsel had two other lengthy strategy meetings with Bloedorn on November 11 and December 18, 2013.

¶4 On January 21, 2014, defense counsel met with Bloedorn to discuss the State's plea offer. Defense counsel "had a very candid discussion with Mr. Bloedorn that this was his decision and his decision alone" whether he decided to go to trial or whether he wished to plead guilty. Under the plea agreement, if Bloedorn pled guilty to count one, repeated sexual assault of a child, the State would move to have the remaining counts, incest and child enticement, dismissed and read in. The State would also ask for a PSI, but it would stay silent with respect to a sentence recommendation. At that meeting, after detailed discussions with defense counsel, Bloedorn decided to plead guilty to count one and to not pursue ***Miranda*** or ***Shiffra***[6] motions.

¶5 Bloedorn pled guilty to repeated sexual assault of a child on February 12, 2014. During the plea hearing, Bloedorn agreed that he "had enough time to meet with [defense counsel] and discuss all [his] options." The circuit court conducted the plea colloquy and was satisfied that Bloedorn entered his plea

[5] The charge in Washington County stemmed from one or more acts of sexual assault against N.T.K. that took place in that county and formed part of the basis for count one in the present case.

[6] ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993).

voluntarily and intelligently. Bloedorn admitted to the acts of sexual assault providing the factual basis for count one, but defense counsel clarified that Bloedorn disagreed with some allegations in the complaint that created the factual basis for counts two and three, which were dismissed. The circuit court remanded Bloedorn into custody, ordered a PSI be completed, and set the case for sentencing.

¶6 After the plea hearing, defense counsel again met with Bloedorn regarding the possibility of conducting an independent psychosexual evaluation. Defense counsel advised Bloedorn that "if we had a psychosexual evaluation done and that psychosexual evaluation came back with a recommendation that [Bloedorn] was a danger to the community or that there was a high risk of recidivism, that that would be incredibly harmful to [him]." According to defense counsel, Bloedorn "was not at a place where he would in a very real sense take responsibility for his behavior. And that would come through loud and clear in any kind of assessment or evaluation that was done."

¶7 While incarcerated and awaiting sentencing, Bloedorn sent two letters to the circuit court on March 4 and 6, 2014. In the March 4 letter, Bloedorn stated, "I didn't do the assault" and "[n]ot once has anyone shown me evidence." Bloedorn denied sexually assaulting his grandson, suggesting instead that his teenage grandson sexually assaulted him. In the March 6 letter, Bloedorn asked to change his plea. He did take "full responsibility for [his] part in this," but he wondered if his plea could be changed because he did not "feel that it is correct." His March 6 letter also stated: "I still can't believe my lawyer … isn't doing more. I have never been told or shown any evidence."

¶8 In a separate letter to defense counsel, Bloedorn asked whether he would be found guilty if he went to trial. In response, defense counsel met with Bloedorn on March 11, 2014, to discuss the possibility of withdrawing his guilty plea. According to defense counsel, Bloedorn asked him to meet with his wife, Laura Bloedorn, because he was

> "embarrassed" to tell Laura about all of the evidence that he knew was against him and that he wanted [defense counsel] to convince … Laura that he was in fact guilty of these offenses and that the plea of guilty was based in fact and that there was a sound reason why he was entering the plea.

At that meeting, Bloedorn chose not to withdraw his guilty plea. On April 2, 2014, defense counsel conducted "a very lengthy interview" with Bloedorn where he read the PSI report to him "word for word." Defense counsel met again with Bloedorn on April 3, 2015. The meeting was an "hour and a half long" and was "almost entirely devoted" to preparation for the sentencing hearing, focusing on Bloedorn taking responsibility for his behavior and not blaming N.T.K.

¶9 At the sentencing hearing on April 7, 2014, the circuit court addressed the letters it received directly from Bloedorn and questioned whether the letters were a request to withdraw his guilty plea. Defense counsel assured the circuit court that was not the case. The circuit court asked Bloedorn directly if he was affirming his plea or if he wanted more time. Bloedorn responded, "No more time." Bloedorn agreed that there was a factual basis for his guilty plea and that he wished to proceed to sentencing. Nevertheless, he asked the court whether there was "a law that says maybe the child takes advantage of a grandparent or of a parent." In response, the State questioned whether the factual basis for Bloedorn's guilty plea was gone, and the circuit court agreed. Although Bloedorn

stated that he would take the statement back because he wanted it "to end today one way or the other" and that he did not "want a trial," the circuit court adjourned the hearing for the next day.

¶10 The following day, defense counsel requested a continuance for three to four weeks so that Bloedorn could decide whether he wanted to withdraw his guilty plea. The circuit court granted defense counsel's request and scheduled a status conference and a trial date. The court noted that in the meantime, the parties should try to work out some agreement as to the specific conduct and file an amended information.

¶11 In anticipation of trial, the State filed an amended information that removed the commingling of the first- and second-degree offenses for the repeated acts, making them all second-degree offenses. At the status conference, defense counsel informed the circuit court that Bloedorn wished to withdraw his guilty plea and to enter an ***Alford*** plea to the amended information. The circuit court granted Bloedorn's request, allowing him to enter an ***Alford*** plea to count one of the amended information for repeated sexual assault of a child.[7] Counts two and three of the amended information were read in and dismissed, and sentencing was scheduled.

¶12 At Bloedorn's sentencing hearing, defense counsel acknowledged that Bloedorn's behavior was "improper and horrific," but argued that he should avoid prison due to several positive factors, including his lack of any criminal record, his support network, and the fact that he had voluntarily entered counseling. Defense counsel referred to the PSI's nine-year prison sentence

[7] The State did not object to Bloedorn entering an ***Alford*** plea.

recommendation as a "very lengthy prison term" and a "very, very harsh recommendation," which he argued was unnecessary given Bloedorn's "very little risk of recidivism." Defense counsel acknowledged that "Bloedorn deserves to go to prison." As an alternative, however, defense counsel recommended that the court impose and stay a prison sentence of fifteen years of initial confinement and ten years of extended supervision, and place Bloedorn on probation for ten years with one year in the county jail as a condition of probation.

¶13 The circuit court, following a lengthy analysis addressing each of the sentencing factors, sentenced Bloedorn to twenty years of initial confinement and five years of extended supervision. The circuit court explained at sentencing:

> [Defense counsel] has done a great job. I think he's done a very good job. But you're the one that said something about being able to charge your grandson for activity in here. That indicates to me a really perverse way of looking at this and not recognizing that you're the adult and that he's [a child]—you're not functioning as equals. You are the one that … is vested with the responsibility here. So you know, probation is not appropriate.

¶14 Bloedorn filed a motion and an amended motion to withdraw his ***Alford*** plea on October 21 and 30, 2014, respectively, alleging that he received ineffective assistance of counsel. The circuit court held a ***Machner***[8] hearing on March 12, 2015. Bloedorn did not testify at the hearing, only Laura and defense counsel were called. Laura primarily testified about the length of the meetings between Bloedorn and defense counsel, although she admitted that she did not attend several of the meetings, and that she was unsure when those meetings occurred and how many took place. Defense counsel testified in detail about the

[8] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

dates of the meetings between himself and Bloedorn and the discussions that took place on those dates. Bloedorn offered no evidence to contradict any of defense counsel's testimony.[9] Defense counsel testified that he reviewed all the discovery materials that he received from the State with Bloedorn. Further, defense counsel explained that in asking for an imposed and stayed sentence he "intentionally [and] strategically asked [the court] for a higher sentence [than suggested by the PSI] to allow the Court to … provide a bigger … hammer over the client's head should he violate the terms of his probation."

¶15 The circuit court found defense counsel's testimony more credible than Laura's testimony and concluded that defense counsel had not rendered ineffective assistance. The court found that defense counsel's representation was competent, effective, strategic and that there were limited options for him to pursue because Bloedorn refused to go to trial. According to the court, Bloedorn put defense counsel in "an impossible position" by declining a trial but refusing to take responsibility and plead guilty. The court also concluded that defense counsel's representation of Bloedorn "was much above the standard of just an average practitioner" and that he "did a good job." The court reasoned that the sentence was largely driven by the seriousness of the offense. The court noted that Bloedorn's inability to come to grips with a bad criminal law violation and accept responsibility made him a danger to the public. Although the court acknowledged that it did not need to reach the issue of prejudice because it specifically found that defense counsel's representation was not deficient, it noted that no prejudice

[9] Bloedorn spoke only one sentence at the ***Machner*** hearing where he stated that he, like Laura, did not "remember the dates [of the meetings] either."

existed under these facts. The circuit court denied Bloedorn's motion to withdraw his ***Alford*** plea. Bloedorn appeals.

DISCUSSION

Standard of Review

¶16 Bloedorn argues that a manifest injustice will occur if he is not allowed to withdraw his plea. To withdraw a guilty plea after sentencing, a defendant "carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a 'manifest injustice.'" ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (citation omitted). One way to demonstrate a "manifest injustice" is to prove the defendant received ineffective assistance of counsel during the plea process. ***State v. Rock***, 92 Wis. 2d 554, 558, 285 N.W.2d 739 (1979).

¶17 To succeed on a claim of ineffective assistance of counsel, a convicted defendant must show that his or her counsel (1) rendered a deficient performance and (2) the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The two-part ***Strickland*** test is applicable to challenges to guilty pleas based on ineffective assistance of counsel. ***Hill v. Lockhart***, 474 U.S. 52, 58 (1985). The only difference being that under the prejudice prong of the ***Strickland*** test, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Hill***, 474 U.S. at 59. "[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." ***Strickland***, 466 U.S. at 698. We uphold the circuit court's findings of fact unless clearly erroneous. ***State v. Carter***, 2010 WI

40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695. Findings of fact include defense counsel's conduct and strategy as well as the circumstances of the case. ***Id.*** We will also not exclude the circuit court's assessments of credibility and demeanor, unless clearly erroneous. ***Id.*** "However, the ultimate determination of whether counsel's assistance was ineffective is a question of law, which we review de novo." ***Id.***

Defense counsel adequately advised Bloedorn regarding the evidence and potential evidence, defense strategy, and potential prison sentences.

¶18 Bloedorn argues that his defense counsel's performance was deficient as he failed to adequately advise him regarding the evidence against him and his possible criminal penalties. Bloedorn claims that (1) communication between Bloedorn and his defense counsel "was so limited that to say [defense counsel] 'represented' [] Bloedorn … would be completely overstating their relationship," (2) defense counsel never advised Bloedorn of or showed Bloedorn any of the evidence against him, and (3) defense counsel never discussed recommending a lengthy prison sentence as a condition of probation nor did defense counsel suggest that Bloedorn "would ever receive more than three years in prison" if he pled guilty. We disagree that defense counsel performed deficiently.

¶19 Judicial scrutiny of counsel's performance is highly deferential, and the defendant must overcome the court's strong presumption that counsel's conduct fell within the wide range of professional assistance. ***Strickland***, 466 U.S. at 688-89. To demonstrate deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," meaning that "counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 687-88.

¶20 Defense counsel testified at the ***Machner*** hearing that he and Bloedorn spent many hours going over the evidence, potential gaps in evidence, developing a defense strategy, and possible sentencing ramifications. Defense counsel also testified that he reviewed all the discovery materials that he received from the State with Bloedorn. Bloedorn did not testify at the ***Machner*** hearing, and he offered no evidence to contradict defense counsel's testimony. Laura's testimony also did not directly contradict defense counsel's testimony as she did not attend all the meetings between defense counsel and Bloedorn, and she was unsure how many meetings occurred, when they took place, and how long they lasted. The circuit court found defense counsel's testimony more credible than Laura's testimony, as it was largely based on his very detailed notes and it was consistent with the conduct the circuit court saw from defense counsel in court.

¶21 Defense counsel also adequately advised Bloedorn about the potential sentence he might face. Defense counsel is only required to inform the defendant of the potential sentence he *might* receive, rather than what sentence he *would* receive. *See* ***State v. Frey***, 2012 WI 99, ¶87, 343 Wis. 2d 358, 817 N.W.2d 436 (stating that "defense counsel should assure that defendants entering a plea understand the potential consequences"). From the beginning, defense counsel explained to Bloedorn that "this was a prison case," but, according to defense counsel, he never suggested to Bloedorn that three years was the maximum possibly penalty. Instead, he informed Bloedorn that the circuit court could sentence Bloedorn to the maximum possible penalty for the offense, which was forty years, if he entered a plea. Defense counsel advised Bloedorn that their strategy, if he pled guilty, was "to convince the Court that the necessity of sending [Bloedorn] to prison was not there in this case" and that defense counsel would

"ask for an imposed and stayed prison sentence with probation and up to a year in the county jail."

¶22 Defense counsel's testimony is uncontested. Although Laura insisted that defense counsel never informed her or Bloedorn of the sentencing recommendation and that she "only heard three [years]," Laura's testimony did not directly contradict defense counsel's testimony as she was not present at all the meetings. Bloedorn also did not provide any contrary testimony at the ***Machner*** hearing. Accordingly, we agree with the circuit court's findings of fact as they are not clearly erroneous. We conclude that defense counsel's conduct did not fall below an objective standard of reasonableness and he did not perform deficiently.

Defense counsel properly advised Bloedorn of the PSI process and had no authority to stop it.

¶23 Bloedorn next argues that defense counsel was deficient, as he allowed the PSI to continue while Bloedorn was considering withdrawing his guilty plea and proceeding to trial. We disagree. Bloedorn's defense counsel has no legal authority to stop a court-ordered PSI from moving forward. *See* ***State v. Hess***, 2009 WI App 105, ¶12, 320 Wis. 2d 600, 770 N.W.2d 769 (noting that "a PSI can be written without the defendant's cooperation"). Since the circuit court ordered that a PSI be completed after Bloedorn entered his guilty plea, the only way a PSI may have been stopped is if Bloedorn withdrew his plea, which was not defense counsel's choice to make.

¶24 Bloedorn alone chose not to withdraw his plea. Before the circuit court accepted Bloedorn's plea, it gave Bloedorn numerous opportunities to withdraw his guilty plea so that the matter could be set for trial. Defense counsel testified that, on at least six occasions, Bloedorn told him that he did not want to have a trial, and Bloedorn himself stated at the end of his sentencing hearing that

he did not want a trial. Defense counsel provided guidance to Bloedorn regarding the PSI. According to defense counsel, before Bloedorn "talked to the presentence writer, [they] went over in detail what it is that he would say to that presentence writer and [defense counsel's] admonition to him on specifically what he should not say to the presentence writer, specifically in the areas of victim blaming." It was Bloedorn's failure to take responsibility for his actions that led to the unfavorable PSI, not the actions of defense counsel. Under the circumstances, we conclude that defense counsel did not perform deficiently for failing to stop a court-ordered PSI, as he had no authority to stop the PSI and he properly counseled Bloedorn on the process.

Defense counsel argued for a reasonable sentence.

¶25 Lastly, Bloedorn argues that defense counsel failed to properly argue for a reasonable prison sentence. Bloedorn contends that defense counsel's sentence recommendation of fifteen years in prison, plus an additional ten years of extended supervision, was "absolutely incredible" and "ridiculous" in light of the nine-year prison sentence that the PSI report recommended.

¶26 We disagree. When determining a defendant's sentence, the circuit court must consider three primary factors: (1) the seriousness of the offense, (2) the character of the offender, and (3) the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The sentencing hearing record is clear that defense counsel stated that these were the factors the court must consider and defense counsel made arguments on behalf of each factor. Additionally, defense counsel explained that his sentence recommendation would deter Bloedorn from engaging in similar crimes because a heavy sentence would be hanging over his head. Although the circuit court stated that defense counsel's

sentence recommendation "was a gamble," it correctly reiterated defense counsel's rationale that an imposed and stayed prison sentence serves as "a hammer over the person's head" and found that "it certainly was a valid way to proceed." Defense counsel's proposal was a strategic decision that had been discussed with Bloedorn. Had the proposal been accepted by the circuit court, Bloedorn would have spent one year in the county jail with fifteen years of prison confinement if he violated his probation. We conclude that defense counsel's conduct did not fall below an objective standard of reasonableness and was not deficient.

¶27 We will not reach the issue of prejudice as Bloedorn cannot establish that defense counsel performed deficiently; therefore, his ineffective assistance argument fails. *See* ***Strickland***, 466 U.S. at 697 (court not required to address both components if defendant makes insufficient showing on one).

¶28 For the foregoing reasons, this court affirms the judgment of conviction and the circuit court's order denying Bloedorn's postconviction motion to withdraw his ***Alford*** plea.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.